

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP832

Cir. Ct. No. 2015CV125

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

HORIZON BANK, NATIONAL ASSOCIATION,

PLAINTIFF-APPELLANT,

V.

**MARSHALLS POINT RETREAT LLC AND
MARSHALL'S POINT ASSOCIATION, INC.,**

DEFENDANTS,

ALLEN S. MUSIKANTOW,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Door County:
D. T. EHLERS, Judge. *Reversed and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Horizon Bank, National Association, (Horizon Bank) sued to foreclose a mortgage and enforce a guaranty made by Allen Musikantow. Upon the parties’ stipulation, a foreclosure judgment was entered, along with a money judgment against Musikantow. The foreclosure judgment provided the proceeds of the sale of the subject premises would be credited toward the money judgment. However, the circuit court later refused to determine the amount of the credit, based on a governing law provision in the guaranty that, according to the court, “indicat[ed] ... [the guaranty was] to be governed by Federal Law.”

¶2 We agree with Horizon Bank that the circuit court erred by refusing to determine the amount of the credit and apply that amount to the money judgment against Musikantow. We therefore reverse the order refusing to apply a credit against the money judgment and remand with directions that the court apply a credit of \$2,250,000—the amount of the winning bid at the sheriff’s sale.

BACKGROUND

¶3 In May 2010, Horizon Bank loaned \$5 million to Marshalls Point Retreat LLC (Marshalls Point). The loan was secured by a mortgage on property located in Sister Bay. In addition, Musikantow provided a continuing guaranty of payment for the loan.

¶4 In August 2015, Horizon Bank filed the underlying lawsuit against Marshalls Point and Musikantow, alleging Marshalls Point had defaulted on its loan by failing to make payments as required. The complaint asserted: (1) a claim to foreclose the mortgage on the Sister Bay property; and (2) a claim against Musikantow seeking a money judgment for the outstanding balance of the loan, pursuant to the terms of his guaranty.

¶5 Shortly after the complaint was filed, the parties stipulated to the entry of judgment on both of Horizon Bank’s claims. The written stipulation, which counsel for all parties signed, contained an “Order for Judgment and Judgment of Foreclosure and Sale and Monetary Judgment” (the judgment), which the circuit court signed on September 10, 2015. The judgment stated Marshalls Point owed Horizon Bank \$4,045,555.55, and it granted Horizon Bank a money judgment against Musikantow in that amount. The judgment further provided the Sister Bay property would be sold at a sheriff’s sale, and

[t]he amount paid to [Horizon Bank] from the proceeds of said sale of the Premises, remaining after deduction by [Horizon Bank] of the amount of interest, fees, costs, expenses, disbursements and other charges paid or incurred by [Horizon Bank] not included in the monetary judgment against [Musikantow] (set forth below) shall be credited by [Horizon Bank] as payment on said monetary judgment.

¶6 At the sheriff’s sale, Horizon Bank submitted a successful credit bid of \$2,250,000. Horizon Bank later moved to confirm the sale, pursuant to WIS. STAT. § 846.165.¹ In its motion, Horizon Bank asserted its credit bid of \$2,250,000 represented the “fair value” of the property.² Horizon Bank submitted two expert witnesses’ affidavits in support of that assertion. Horizon Bank further clarified in its motion to confirm the sale that it would not seek a deficiency

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² See WIS. STAT. § 846.165(2) (If the mortgaged premises sell for less than the mortgage debt, “there shall be no presumption that such premises sold for their fair value and no sale shall be confirmed and judgment for deficiency rendered, until the court is satisfied that the fair value of the premises sold has been credited on the mortgage debt, interest and costs.”); see also *Bank of New York v. Mills*, 2004 WI App 60, ¶15, 270 Wis. 2d 790, 678 N.W.2d 332 (holding that § 846.165(2) requires a court to determine the premises’ fair value, even where the mortgagee does not seek a deficiency judgment).

judgment against Marshalls Point. Finally, Horizon Bank asked the circuit court to reduce the amount of the money judgment against Musikantow by the amount of the bank's winning bid.

¶7 In response, Marshalls Point and Musikantow conceded that, because Horizon Bank was not seeking a deficiency judgment, it was entitled to a presumption that its winning bid at the sheriff's sale represented the property's fair value. See *Bank of New York v. Mills*, 2004 WI App 60, ¶15, 270 Wis. 2d 790, 678 N.W.2d 332. Marshalls Point and Musikantow further asserted they had no objection to the sale being confirmed at the price bid by Horizon Bank. They argued, however, that the property had a "fair market value exceeding \$4,500,000," and that amount, rather than the winning bid of \$2,250,000, should be credited toward the money judgment against Musikantow.

¶8 A hearing on Horizon Bank's motion to confirm the sheriff's sale was held on December 2, 2015. During the hearing, Marshalls Point and Musikantow indicated they did not oppose confirmation of the sale at a price of \$2,250,000, as long as the order confirming the sale included language stating the sale price would not be given preclusive effect "should Horizon Bank seek to recover against [Musikantow] on all or any part of the judgment against [Musikantow] as guarantor of this obligation." Horizon Bank objected to the inclusion of that language. Counsel for Marshalls Point and Musikantow then indicated he had a witness present in court who was prepared to testify the property had a "market value" exceeding \$10 million. In order to allow both sides adequate time to prepare and present evidence, the circuit court adjourned the hearing until December 22.

¶9 At the beginning of the December 22 hearing, counsel for Marshalls Point and Musikantow asserted that, although there was “a great deal of testimony” he could present, upon further consideration, he no longer believed it was necessary for the court to make an evidentiary finding regarding the value of the Sister Bay property. Instead, counsel noted the guaranty Musikantow signed contained a governing law provision stating the guaranty would be governed “by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Indiana without regard to its conflicts of law provisions.” Counsel then observed Horizon Bank had already commenced a federal lawsuit in Florida, the state where Musikantow resided, in order to “authenticate” the money judgment against him. Counsel therefore argued the amount of the credit to be applied against the money judgment was “more likely to be litigated in the State of Florida.”

¶10 In response, counsel for Horizon Bank explained that the Florida action was simply “a domestication of the money judgment that this Court has already entered on the guarantee in these proceedings.” Counsel further asserted that, “if [Musikantow] wanted to point to some federal law that absolved him in some way of his guarantee liability, he should have raised [that law] before the [money] judgment was entered.” Counsel also observed there was no question the circuit court had the personal and subject matter jurisdiction necessary to determine the amount of the credit that should be applied toward the money judgment against Musikantow.

¶11 At the end of the December 22 hearing, the circuit court granted Horizon Bank’s motion for confirmation of the sheriff’s sale, specifically finding, based on the affidavits Horizon Bank submitted, that the bid price of \$2,250,000 represented the “fair and reasonable value for the property.” However, the court

also granted Musikantow's oral motion and declined to rule on the credit to be applied to the money judgment against him. The court explained it would not address that issue because the guaranty clearly indicated it was to be governed by federal law. The court concluded, "I guess if the federal courts kick this back to me to make a decision what is to be the appropriate credit under the commercial guarantee, well, then we'll have a hearing and I'll make that decision. But I'm not going to preempt federal law at this point."

¶12 The circuit court entered two orders memorializing the oral rulings it made during the December 22 hearing. First, on the same day as the hearing, the court entered an "Order Confirming Sheriff's Sale," which confirmed the sale of the subject property to Horizon Bank for \$2,250,000 and specifically stated that amount represented the fair value of the premises. The court crossed out the final paragraph of the order, which stated:

After application to the Judgment indebtedness of the amount bid at sheriff's sale of \$2,250,000.00, there remains due under the Judgment entered against Allen S. Musikantow the sum of \$1,869,460.70, as of November 4, 2015, together with subsequently accruing interest, fees and costs.

¶13 Second, on January 22, 2016, the circuit court entered an order stating that, "in light of the language in the Guaranty document indicating that it is to be governed by Federal Law," the court "grants the motion of Allen S. Musikantow to decline to make a finding of the amount to be credited against the judgment of Horizon Bank, National Association against [Musikantow] as guarantor." The January 22 order further stated the court "will, if requested by a

Federal Court, make a determination as to such amount to be credited against the judgment.”³ Horizon Bank now appeals from the January 22 order.⁴

DISCUSSION

I. Musikantow’s arguments regarding appellate jurisdiction, waiver, and claim preclusion

¶14 As a threshold matter, Musikantow argues Horizon Bank’s appeal is untimely, and we therefore lack jurisdiction. *See* WIS. STAT. RULE 809.10(1)(e). Musikantow contends Horizon Bank’s appeal “challenges the actions of the trial court at the [hearing on the] Motion for Confirmation of Sale.” Musikantow therefore argues Horizon Bank was required to appeal the December 22, 2015 order confirming the sheriff’s sale. Horizon Bank’s notice of appeal was not filed until April 20, 2016, more than ninety days after entry of the December 22 order. *See* WIS. STAT. § 808.04(1).

¶15 The notice of appeal, however, specifically states that Horizon Bank is appealing the circuit court’s January 22, 2016 order. In that order, the court expressly stated it would not make any finding as to the amount to be credited toward the money judgment against Musikantow. The notice of appeal was filed

³ Following the circuit court’s ruling on this issue, Horizon Bank moved for voluntary dismissal of its federal lawsuit against Musikantow. The United States District Court for the Middle District of Florida granted that motion on May 3, 2016.

⁴ At first blush, it appears odd that Horizon Bank would appeal an order declining to apply a substantial credit to a money judgment owed to it by Musikantow. However, Horizon Bank explains in its principal brief that, “[a]s a result of the trial court’s refusal to apply any credit at all, Horizon Bank’s further efforts to attempt collection of the monetary judgment ... will be faced with Musikantow’s efforts to re-litigate the value of the mortgaged premises and the credit to be applied.”

less than ninety days after entry of the January 22 order, and was therefore timely.
See id.

¶16 Musikantow insists that, in substance, Horizon Bank’s appeal is actually an attack on the December 22 order confirming the sheriff’s sale. We disagree. During the December 22 hearing, the circuit court considered two related, but distinct, issues: (1) whether to confirm the sale of the subject property to Horizon Bank at a price of \$2,250,000; and (2) whether that amount should be credited toward the money judgment that had already been entered against Musikantow. In the December 22 order, the court confirmed the sale. The court struck language in that order addressing the issue of the credit against the money judgment. Without that language, the December 22 order was effectively silent on the issue of the credit. It was not until January 22 that the court expressly incorporated its oral ruling regarding the credit into a written order. Thus, in order to challenge that ruling, Horizon Bank properly appealed from the January 22 order, rather than the December 22 order. The January 22 order is not, as Musikantow asserts, simply a “supplemental order” that cannot be used to “collaterally attack” the order confirming sale.⁵

⁵ Contrary to his position on appeal, Musikantow seemingly believed in the circuit court that a separate order memorializing the court’s ruling on the credit issue was necessary. During the December 22 hearing, the court asked counsel for Horizon Bank to prepare an order confirming sale. The court then addressed counsel for Musikantow, stating, “[I]f you believe a separate order regarding this federal issue is appropriate, I’d ask you to submit that to the Court for my review and signature obviously giving plaintiff an opportunity to object.”

The circuit court signed an order confirming sale on December 22, which, as noted above, did not expressly address the credit to be applied against the money judgment. On January 14, 2016, Musikantow submitted a proposed order to the court regarding its ruling on the credit issue. Horizon Bank objected to the proposed order and submitted a modified version for the court’s consideration. Musikantow subsequently indicated he had no objection to the modified order, and the court signed that order on January 22.

¶17 In a related argument, Musikantow asserts Horizon Bank waived its right to appeal the January 22 order by “accept[ing] the benefit of the Order Confirming Sale by obtaining legal right to the property in question.” He cites *Stevens Construction Corp. v. Draper Hall, Inc.*, 73 Wis.2d 104, 111, 242 N.W.2d 893 (1976), for the proposition that a party waives its right to appeal when it “accepts the fruits of a judgment to which [it] may not be entitled if [its] appeal succeeds.” This argument is unavailing because Horizon Bank’s success or failure in this appeal will have no effect on its entitlement to the relief provided by the order confirming sale. Our conclusion that the circuit court erred by refusing to apply a credit toward the money judgment against Musikantow does not affect the court’s previous order confirming the sale of the subject property to Horizon Bank at a price of \$2,250,000, which remains valid and enforceable.

¶18 Finally, Musikantow also asserts “the doctrine of claim preclusion bars the claim of Horizon Bank here.” This argument fails for the same essential reason as Musikantow’s two previous arguments: the December 22 order did not expressly address whether a credit should be applied toward the money judgment against Musikantow. As a result, the December 22 order cannot be given preclusive effect as to that issue. Contrary to Musikantow’s assertion, by appealing from the January 22 order, Horizon Bank is not attempting to relitigate a claim that was already decided on the merits in a previous proceeding. See *Kruckenbergh v. Harvey*, 2005 WI 43, ¶19, 279 Wis. 2d 520, 694 N.W.2d 879.

II. Governing law provision

¶19 The circuit court declined to rule on the amount of the credit to be applied toward the money judgment against Musikantow based on the governing law provision in the guaranty. As noted above, that provision states the guaranty

is governed by federal law and, to the extent not preempted by federal law, by the laws of Indiana. The circuit court concluded this language prevented it from ruling on the amount of the credit, unless it was “requested” to do so by a federal court.

¶20 The circuit court misinterpreted the governing law provision.⁶ The governing law provision is not a choice of venue provision; it does not specify where any lawsuit concerning the guaranty must be adjudicated.⁷ Instead, the governing law provision simply indicates which jurisdiction’s substantive law governs the guaranty. Here, Horizon Bank’s claim to enforce the guaranty was brought in the Door County Circuit Court, and no argument has been made that the circuit court lacked either subject matter jurisdiction over that claim or personal jurisdiction over any of the parties. Accordingly, there is no reason why the circuit court could not apply whatever law was appropriate—be it Wisconsin law, federal law, or Indiana law—in order to determine the appropriate credit to apply toward the money judgment against Musikantow. The circuit court therefore erred by refusing to determine the amount of the credit.

⁶ The interpretation of a contract presents a question of law that we review independently. *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶32, 363 Wis. 2d 699, 866 N.W.2d 679.

⁷ The guaranty actually contains a separate choice of venue provision, which provides, “If there is a lawsuit, Guarantor agrees upon Lender’s request to submit to the jurisdiction of the courts of LAPORTE County, State of Indiana.” Despite this provision, Horizon Bank brought its claim to enforce the guaranty in the Door County Circuit Court, as part of its related action to foreclose the mortgage on the Sister Bay property.

III. Amount of the credit

¶21 Horizon Bank argues that, based upon the parties’ stipulation, the circuit court should have applied a credit of \$2,250,000—the amount of its winning bid at the sheriff’s sale—to the money judgment against Musikantow. We agree.⁸

¶22 Horizon Bank, Marshalls Point, and Musikantow stipulated to the entry of a foreclosure judgment against Marshalls Point and a money judgment against Musikantow.⁹ The judgment, which the parties agreed to as part of their stipulation, specifically provided, “The amount paid to [Horizon Bank] from the proceeds of said sale of the Premises ... shall be credited by [Horizon Bank] as payment on said monetary judgment” against Musikantow. The only reasonable interpretation of the phrase “[t]he amount paid to [Horizon Bank] from the proceeds of said sale of the Premises” is that it refers to the amount of the winning bid at the sheriff’s sale.

⁸ The interpretation of a stipulation presents a question of law that we review independently. See *Stone v. Acuity*, 2008 WI 30, ¶21, 308 Wis. 2d 558, 747 N.W.2d 149.

Musikantow argues Horizon Bank forfeited its argument regarding the parties’ stipulation by failing to raise it in the circuit court. However, the forfeiture rule is one of administration, not jurisdiction. *LaBeree v. LIRC*, 2010 WI App 148, ¶33, 330 Wis. 2d 101, 793 N.W.2d 77. Here, assuming without deciding that Horizon Bank forfeited its argument regarding the parties’ stipulation, we nevertheless exercise our discretion to address the argument because it presents a question of law and does not require resolution of any factual disputes. See *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 2001 WI App 300, ¶12, 249 Wis. 2d 142, 638 N.W.2d 355.

⁹ The parties’ stipulation meets the requirements of WIS. STAT. § 807.05 and is therefore enforceable. Although stipulations can be set aside under WIS. STAT. § 806.07(1), see *Burmeister v. Vondrachek*, 86 Wis. 2d 650, 664, 273 N.W.2d 242 (1979), Musikantow has not moved to set aside the parties’ stipulation.

¶23 Musikantow conceded in the circuit court that the bid price of \$2,250,000 represented the fair value of the subject property, and he does not argue otherwise on appeal. The circuit court expressly found that the bid represented the property's fair value, and it therefore confirmed the sheriff's sale. Upon confirmation of the sale, title to the property was transferred to Horizon Bank, and the bank therefore received "proceeds of said sale" worth \$2,250,000. Accordingly, based on the parties' stipulation and the judgment entered according to its terms, the court should have applied a \$2,250,000 credit toward the money judgment against Musikantow.

¶24 We recognize that the guaranty's governing law provision states the guaranty is governed by federal law and, to the extent not preempted by federal law, by Indiana law. However, Musikantow has not cited, either in the circuit court or on appeal, any provision of federal or Indiana law that is contrary to our conclusion the parties' stipulation requires a \$2,250,000 credit toward the money judgment. We will not abandon our neutrality to develop arguments for the parties. See *Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

¶25 For the foregoing reasons, we reverse the circuit court's January 22, 2016 order, in which the court "decline[d] to make a finding of the amount to be credited against the judgment of Horizon Bank, National Association against

[Musikantow] as guarantor.” We remand for the court to amend the money judgment against Musikantow by applying a credit of \$2,250,000.¹⁰

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

¹⁰ Horizon Bank argues, in the alternative, that Wisconsin law requires the application of a \$2,250,000 credit toward the money judgment. Because we conclude a \$2,250,000 credit is otherwise required by the parties’ stipulation, we need not address Horizon Bank’s alternative argument. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

